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February 4, 2022

**VIA ECF & E-MAIL**

United States District Court  
Southern District of New York  
Attn: Hon. Andrew L. Carter, U.S.D.J.  
40 Foley Square, Courtroom 1306  
New York, NY 10007-1312  
alcarternysdchambers@nysd.courts.gov

**Re: Pagan v. C.I. Lobster Corp., et al.**  
**Case No: 1:20-cv-7349 (ALC) (SDA)**  
**MLLG File No.: 197-2020**

Dear Judge Carter:

This firm represents the Defendants, who submit this letter motion in accordance with ¶ 2(A) of this Court’s Individual Practices to respectfully request a pre-motion conference in anticipation of Defendants’ motion to dismiss Plaintiff’s First Amended Complaint (“FAC”) for failure to state a claim upon which relief can be granted pursuant to Rule 12(c) of the Federal Rules of Civil Procedure (hereinafter referred to as “Rules” or “Rule”). Defendants provide the basis of their anticipated motion below.

**Relevant Background**

On September 9, 2020, Plaintiff Joseph Pagan (“Plaintiff”) filed the instant lawsuit. See Docket Entry 1. Following Defendants’ letter motion for a pre-motion conference in anticipation of its motion to dismiss, Plaintiff amended his complaint. See Docket Entries 22-24. Plaintiff’s FAC asserts causes of action under: (i) the Fair Labor Standards Act (“FLSA”) for unpaid minimum wages; (ii) the FLSA for unpaid overtime wages; (iii) the New York Labor Law (“NYLL”) for unpaid minimum wages; (iv) the NYLL for unpaid overtime wages; (v) the NYLL for failure to furnish wage notices; (vi) the NYLL for failure to furnish wage statements; (vii) the NYLL for spread of hours compensation; (viii) the NYLL for illegal deductions for gratuities. See Docket Entry 25.

**This Court Should Dismiss Plaintiff’s Wage-and-Hour Claims for Failure to State a Claim**

Plaintiff alleges he was paid \$10.00 per hour and was not compensated for all hours worked. See Docket Entry 25 at ¶¶ 37-44. He also claims, without any factual details in support, that he was not paid overtime for hours worked in excess of forty (40) hours per week. See Id. at ¶¶ 25, 63.

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He similarly conclusorily alleges that he was not paid “spread of hours” premium on days when his workdays lasted longer than ten (10) hours a day, but fails to identify a single day that he worked more than ten (10) hours. Id. at ¶47. Plaintiff also complains that a tip credit was taken against his wages such that his wages paid were less than the full minimum wage, but fails to identify a single week in which he was paid less than the minimum wage. Id. at ¶¶ 48-51. Plaintiff’s pleadings reference Defendants’ time records and refer to them as inaccurate. Id. at ¶¶ 25, 27, 76.

The FLSA requires that a covered employee be compensated at a rate of no less than one and one-half times the regular rate of pay for any hours worked in excess of forty per week. See 29 U.S.C. § 207(a)(1). The NYLL adopts this same standard. See 12 NYCRR § 142-2.2 (incorporating the FLSA definition of overtime into the NYLL). “[T]o survive a motion to dismiss [an FLSA overtime claim], [p]laintiffs must allege sufficient factual matter to state a plausible claim that they worked compensable overtime in a workweek longer than 40 hours.” See Lundy v. Catholic Health System of Long Island Inc., 711 F.3d 106, 114 (2d Cir. 2013); see also Nakahata v. New York-Presbyterian Healthcare Sys., Inc., 723 F.3d 192, 200 (2d Cir. 2013).

Allegations that a plaintiff “regularly worked” more than forty hours per week are insufficient to state a claim. See Dejesus v. HF Mgmt. Servs., LLC, 726 F.3d 85, 89-90 (2d Cir. 2013) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570); Nakahata, 723 F.3d at 199-201; Gisomme v. HealthEx Corp., No. 13-CIV.-2541, 2014 WL 2041824, at \*2 (E.D.N.Y. May 15, 2014) (concluding Plaintiff’s “allegation of an ‘average’ of 50 hours or more” per week insufficient to “state a claim for failure to pay overtime compensation in a given workweek” (internal quotation marks omitted)).

Here, Plaintiff fails to remotely meet the plausibility standard required to state a claim for his wage-and-hour causes of action. He fails to identify a single week in which he worked and was not paid at least the minimum wage or any overtime wages. Accordingly, his wage-and-hour claims must be dismissed for failure to state a claim. For the same reason, he may not conditionally certify a collective action because he has failed to establish any violation of the FLSA.

**Plaintiff’s Wage Claims Fail Because the Time Records, Incorporated by Reference in the Pleadings, Show That Plaintiff Never Worked Overtime & Was Paid for All Hours Worked**

The standard for ruling on a Rule 12(c) motion is virtually identical to the standard under Rule 12(b)(6). See Hayden v. Paterson, 594 F.3d 150, 157 n.4 (2d Cir. 2010); see also George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 553 (2d Cir. 1977). Thus, in considering this motion for judgment on the pleadings, the Court accepts as true all of the well-pleaded facts alleged in the Complaint. Id. at 553; see also Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (complaint must set forth factual allegations that are “enough to raise a right to relief above the speculative level”). The Court should dismiss the Complaint if it appears beyond doubt that Plaintiff can prove no plausible set of facts to support her claims which would entitle her to relief. See Twombly, 550 U.S. at 555.

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In determining the sufficiency of Plaintiff's claims, the Court may consider documents attached to, *or incorporated by reference in*, the pleadings; matters of which judicial notice may be taken; or *documents either in Plaintiff's possession or of which she had knowledge and on which she relied in bringing suit*. See Brass v. American Film Technologies, Inc., 987 F.2d 142, 150 (2d Cir. 1993); Conlking v. Brookhaven Science Assoc., Inc., 2012 WL 2160439, at \*2 (E.D.N.Y. June 12, 2012). Indeed, a court may also consider “a document [that] is not incorporated by reference ... where the complaint ‘relies heavily upon its terms and effect,’ which renders the document ‘integral’ to the complaint.” See Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002) (citations omitted).<sup>1</sup>

Here, Plaintiff references and relies on Defendants' time and pay records in his complaint by stating – conclusorily – that they are inaccurate. However, Plaintiff fails to allege any facts supporting the allegation that Defendants' records are somehow inaccurate. Moreover, Defendants' records show that Plaintiff never once worked more than forty (40) hours in any week, and that Plaintiff was always paid at least the minimum wage when accounting for tips received. See Docket Entry 38-2; see also copies of a sampling of paystubs establishing that Plaintiff was properly paid annexed hereto as **Exhibit “A.”** As such, this Court should be able to review Defendants' time and pay records in order to assess whether Plaintiff states a claim under the FLSA, and – upon dismissing the FLSA claims – this Court should decline to exercise supplemental jurisdiction over the remaining state law claims. See 28 U.S.C. § 1367.

It is also worthy to note that the complaint allegations themselves only state that Plaintiff “generally” worked certain hours without any specific dates, nor has Plaintiff outlined any details as to alleged off-the-clock work. Indeed, the words “off the clock” are nowhere to be found in the complaint. This is not enough to plead a claim under the FLSA. See Lundy, Nakahata, and DeJesus, *supra*.

Finally, the claims against individual defendants Richard Mandarino and John Mandarino must be dismissed because the complaint only alleges that they had the power to hire and fire without more. This is not enough to state a claim against an individual as an employer. See Inclan v. New York Hosp. Group, Inc., 95 F Supp 3d 490, 507 (S.D.N.Y. 2015) (setting forth at least three additional factors to consider other than the power to hire and fire to determine individual liability under the FLSA).

Accordingly, Defendants' third letter motion for a pre-motion conference should be granted. Defendants thank this honorable Court for its time and attention to this case.

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<sup>1</sup> Where the material allegations are admitted or not controverted, the motion may be decided pursuant to Rule 12(c). See Sheppard v. Beerman, 18 F.3d 147, 151 (2d Cir. 1994); see also 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1367 (3d ed. 2021) (“[J]udgment on the pleadings only has utility when all material allegations of fact are admitted or not controverted in the pleadings and only questions of law remain to be decided by the district court”). However, if this Court determines that there exist disputed issues of fact, Defendants are prepared for this Court to convert the Rule 12(c) motion to a Rule 56 motion for summary judgment. See Lively v. WAFRA Inv. Advisory Group, Inc., 6 F.4th 293, 302 (2d Cir 2021).

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Dated: Lake Success, New York  
February 4, 2022

Respectfully submitted,

**MILMAN LABUDA LAW GROUP PLLC**

\_\_\_\_\_  
/s

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(516) 303-1395 (direct dial)  
(516) 328-0082 (facsimile)  
emanuel@mllaborlaw.com

cc: Plaintiff (via ECF).

# **EXHIBIT A**

CI Lobster Corp  
691 Bridge Street  
Bronx, NY 10464

DATE	CHECK NO.
04/05/2019	0035248

AMOUNT  
PAY One Hundred Twenty-Four and 71 / 100 \$ 124.71

TO THE  
ORDER OF

Joseph F. Pagan

\_\_\_\_\_  
AUTHORIZED SIGNATURE(S)  
VOID AFTER 90 DAYS

[REDACTED]

#### GENERAL INFORMATION

CI Lobster Corp  
Bronx, NY 10464 (718)885-1459

00000001 - Main\_00000001 - Main\_00000300 - 300  
Joseph F. Pagan EE # 00011588 SSN: \*\*\*3647

PAY PERIOD 03/25/19 TO 03/31/19

PAY FREQ Weekly

CHECK DATE 04/05/2019 CHECK # 0035248

EARNINGS	PIECES	HOURS	YTD HOURS	AMT	YTD AMT
Regular Hours		40.00	40.00	600.00	600.00
Tips				671.00	671.00

#### VARIABLE PAY INFORMATION

EARNINGS	DEPT	RATE ID	PCS	HRS	RATE	AMT
Regular Hrs	300			40.00	15.00	600.00
Tips	300					671.00

TOTAL EARNINGS	40.00	40.00	\$1,271.00	\$1,271.00
FILING STATUS	TAX TYPE		AMT	YTD AMT
Federal M 3	+25.00	Federal	89.75	89.75
State M 3	+0.00	FICA	66.40	66.40
		Medicare	15.53	15.53
		NYC Marry	35.16	35.16
		NY State	47.91	47.91

TOTAL

40.00

\$1,271.00

TOTAL WITHHOLDINGS

\$254.75

\$254.75

ACCRL	EARNED	TAKEN	BALANCE
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ADJUSTMENTS	MATCH	YTD MATCH	AMT	YTD AMT
MEALS			18.00	18.00
PFL			1.94	1.94
SDINY			0.60	0.60
TIPCREDIT			200.00	200.00
TOTAL DED			\$220.54	\$220.54

#### DIRECT DEPOSIT INFORMATION

NET PAY

AMT YTD AMT

\$124.71 \$124.71

CI Lobster Corp  
691 Bridge Street  
Bronx, NY 10464

DATE	CHECK NO.
09/27/2019	0036726

AMOUNT  
PAY Sixty-Nine and 27 / 100 \$ 69.27

TO THE  
ORDER OF

Joseph F. Pagan

AUTHORIZED SIGNATURE(S)  
VOID AFTER 90 DAYS



GENERAL INFORMATION

CI Lobster Corp  
Bronx, NY 10464 (718)885-1459

EARNINGS	PIECES	HOURS	YTD HOURS	AMT	YTD AMT
Regular Hours		29.00	729.00	435.00	10,935.00
Tips				382.00	14,099.00

00000001 - Main\_00000001 - Main\_00000300 - 300

Joseph F. Pagan EE # 00011588 SSN: \*\*\*3647

PAY PERIOD 09/16/19 TO 09/22/19

PAY FREQ Weekly

CHECK DATE 09/27/2019 CHECK # 0036726

VARIABLE PAY INFORMATION

EARNINGS	DEPT	RATE ID	PCS	HRS	RATE	AMT
Regular Hrs	300			29.00	15.00	435.00
Tips	300					382.00

TOTAL EARNINGS	29.00	729.00	\$817.00	\$25,034.00
FILING STATUS		TAX TYPE	AMT	YTD AMT
Federal M 3	+25.00	Federal	45.28	1,472.95
State M 3	+0.00	FICA	41.66	1,333.57
		Medicare	9.74	311.88
		NYC Marry	18.60	332.47
		NY State	23.14	853.64

TOTAL

29.00

\$817.00

TOTAL WITHHOLDINGS

\$138.42

\$4,304.51

ACCRL	EARND	TAKEN	BALANCE
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ADJUSTMENTS	MATCH	YTD MATCH	AMT	YTD AMT
GARNISH2			56.00	1,764.00
GARNISH2			6.46	203.49
MEALS			18.00	392.40
PFL			1.25	38.30
SDINY			0.60	15.60
TIPCREDIT			145.00	3,525.00
TOTAL DED			\$227.31	\$5,938.79

DIRECT DEPOSIT INFORMATION

NET PAY

AMT YTD AMT

\$69.27 \$691.70

DATE	CHECK NO.
03/20/2020	

CI Lobster Corp  
691 Bridge Street  
Bronx, NY 10464

AMOUNT  
PAY \*\*\*VOID\*\*\*VOID\*\*\* THIS IS NOT A CHECK \*\*\*VOID\*\*\*VOID\*\*\* \$ 0.00

TO THE  
ORDER OF

Joseph F. Pagan

AUTHORIZED SIGNATURE(S)  
VOID AFTER 0 DAYS

#### GENERAL INFORMATION

CI Lobster Corp  
Bronx, NY 10464 (718)885-1459

00000001 - Main\_00000001 - Main\_00000300 - 300  
Joseph F. Pagan EE # 00011588 SSN: \*\*\*3647

PAY PERIOD 03/09/20 TO 03/15/20

PAY FREQ Weekly

CHECK DATE 03/20/2020 CHECK #

#### EARNINGS PIECES HOURS YTD HOURS AMT YTD AMT

Regular Hours		12.00	188.00	180.00	2,820.00
Tips				366.00	4,129.00

#### VARIABLE PAY INFORMATION

EARNINGS	DEPT	RATE ID	PCS	HRS	RATE	AMT
Regular Hrs	300			12.00	15.00	180.00
Tips	300					366.00

TOTAL EARNINGS	12.00	188.00	\$546.00	\$6,949.00
FILING STATUS				
Federal M 3	+25.00	Federal		268.42
State M 3	+0.00	FICA	30.13	372.57
		Medicare	7.05	87.14
		NYC Marry		61.50
		NY State	7.49	156.76

TOTAL	12.00	\$546.00	TOTAL WITHHOLDINGS	\$44.67	\$946.39
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ACCRL	EARNED	TAKEN	BALANCE	ADJUSTMENTS	MATCH	YTD MATCH	AMT	YTD AMT
				GARNISH2			56.00	643.26
				GARNISH2			6.46	77.52
				MEALS			10.80	151.20
				PFL			1.47	17.93
				SDINY			0.60	7.20
				TIPCREDIT			60.00	940.00
				TOTAL DED			\$135.33	\$1,837.11

DIRECT DEPOSIT INFORMATION	NET PAY	AMT	YTD AMT
		\$0.00	\$36.50